# No. 21,591

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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SAHRAD KERKOCHIAN, JR., etc.,
*Appellant,*

vs.

B. E. SHIELDS, Trustee of the Estate of Ronald O. Reichert,
*Appellee.*

**On Appeal from the United States District Court for the Eastern District of California**

**BRIEF FOR APPELLEE**

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## BRIEF FOR APPELLEE

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B. E. Shields, Trustee of the Estate of Ronald O. Reichert, Bankrupt, answers Appellant's brief herein as follows:

### PRELIMINARY STATEMENT OF THE CASE

Since both parties to this appeal have been formally designated throughout the proceedings by various captions, Appellee herein proposes for convenience and clarity to refer to himself as "the Trustee" and to Appellant as "United Carpet."

Both parties to this appeal have appeared before the referees below and the District Court, sitting in

bankruptcy, almost continuously since May of 1964. Throughout these proceedings, United Carpet has sought to find some security for its claim against the bankrupt and the bankrupt's estate. It was never successful, and all proceedings finally culminated in the disallowance of United Carpet's claim as a secured creditor and its allowance as an unsecured creditor only, by Order of the Referee on March 15, 1966 (R. 90-92).

Said Order was later confirmed by the District Court, who found after examining all the evidence and hearing all arguments advanced by counsel for both parties, that the same had been rightly determined (R. 174).

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## STATEMENT OF FACTS

1. Facts occurring prior to the filing of a Creditors' Petition below to have Ronald O. Reichert involuntarily adjudged a bankrupt (January 24, 1964-May 1, 1964).

A. On January 24, 1964, Ronald O. Reichert entered into an agreement with American National Insurance Company, wherein Reichert as "Buyer" agreed to purchase from American National as "Seller" certain real property and leasehold interests in the City of Bakersfield, Kern County, California hereafter referred to as "Bakersfield Inn," and Reichert further agreed to substantially repair, rehabilitate and improve said real property (R. 2-9).

B. Concurrently with the making of said agreement, Reichert agreed to and did assign to American National his undivided one-half interest in a certain promissory note in the principal amount of $800,000, hereafter referred to as the "Dinkler note," as collateral security for his performance of said repairs and improvements (R. 10-14).

The total principal amount of said note was secured by a second deed of trust on certain Fresno County real property, hereafter referred to as "the Fresno property."

The assignment provided among other things (R. 13) that if Reichert permitted any lien of any kind to be filed against the Bakersfield Inn property and did not remove the same forthwith upon demand, then American National had the right either to apply the accumulated proceeds of said note or as the same might accrue, to pay and satisfy any liens filed against said real property, "and/or" to use said funds to secure performance of Reichert.

C. Reichert, at the same time, further assigned his beneficial interest in said Dinkler note to the Greenfield State Bank of Bakersfield, California, to secure an indebtedness to said bank in the principal amount of $27,500 (R. 50, lines 10-17).

D. United Carpet, its agents and assigns, furnished and installed certain carpet material in the Bakersfield Inn for Reichert, commencing on or about January 19, 1964, and because of the failure of Reichert to pay them for the same, recorded a

mechanic's lien claim for the same on May 1, 1964 (R. 40).

2. Facts occurring subsequent to the filing of United Carpet's mechanic's lien claim and relating to items of property in which United Carpet has claimed a security interest herein (May 1, 1964-May 3, 1965).

A. A Creditors' Petition to have Reichert involuntarily adjudicated a bankrupt was filed with the District Court on May 1, 1964 (R. 15-19), and he was so adjudicated on July 24, 1964 (R. 33).

B. On July 15, 1964, and prior to Reichert's adjudication as a bankrupt, United Carpet filed a petition for examination of Reichert and others pursuant to Section 21(a) of the Bankruptcy Act, for an order to show cause in re the nature, extent and validity of alleged liens, and for a temporary restraining order, and said order to show cause and restraining order were issued (R. 20-26, 29-32).

C. United Carpet's petition for the 21(a) examination alleged, among other matters, that the second deed of trust on the Fresno property, securing the Dinkler note, and more particularly that portion which was assigned to American National Insurance Company, was so assigned as security for Reichert's agreement to improve the Bakersfield Inn property (See paragraph VIII of said Petition, R. 24-25).

D. Said 21(a) examination was heard by Referee McGugin on July 24, 1964, continued to August 5, 1964, again to September 2, 1964, and finally to Sep-

tember 22, 1964, with attorneys Donald Franson and Vergil Gerard appearing as attorneys at said examination on behalf of United Carpet (R. 36). During the course of the 21(a) examination, Ronald O. Reichert was questioned by Attorney Gerard as to the effect of the assignment of said Dinkler note to American National and whether or not such assignment was meant for the protection of possible mechanic's lien claimants (R. 115). During said 21(a) examination, United Carpet's counsel introduced into evidence as its Exhibit 1, the Agreement dated January 24, 1964, between American National Insurance Company and Reichert (R. 2).

E. On September 8, 1964, the Trustee gave notice of his intention to sell on September 22, 1964, the bankrupt's interest in the Bakersfield Inn real property and certain personal property associated therewith (R. 34-35).

The sale was held before Referee McGugin on September 22, 1964, and the interest of the bankrupt in the personal property was sold for the sum of $5,000. The bankrupt's interest in said Bakersfield Inn real property and leasehold interests were abandoned (R. 36-38).

F. On October 13, 1964, Referee McGugin issued an order (1) discharging the temporary restraining order issued on July 15, 1964, pursuant to United Carpet's petition for the same; (2) approving the sale of said personal property owned by the bankrupt; and (3) authorizing the Trustee to abandon the Bakersfield Inn property (R. 36-38).

G. On July 2, 1964, United Carpet filed a complaint in the Kern County Superior Court, Action No. 89999, to foreclose its mechanic's lien against the Bakersfield Inn property, naming Ronald O. Reichert and American National Insurance Company, among others, as defendants (R. 76-83).

H. On February 19, 1965, appellant United Carpet filed its creditor's claim in the within bankruptcy matter, claiming to be both an "unsecured and secured creditor." A copy of the claim of mechanic's lien executed by claimant was attached to the bankruptcy claim (R. 39), although United Carpet had notice and knowledge of the abandonment of the property on which it claimed a lien, as the result of the Referee's order of October 13, 1964 (R. 36-38).

I. On March 30, 1965, the Trustee filed his petition for leave to compromise a controversy involving the bankrupt's interest in the Dinkler note, and for authority to sell the same (R. 48-51). The proposed compromise also provided for the payment to American National and Greenfield State Bank for their assigned interests in said note of the sum of $6,250 each (R. 51, 52).

Notice of the proposed compromise was mailed to all creditors who had filed claims in the within bankrupt's estate (R. 45-47). United Carpet admitted receiving such notice at the time of its mailing (R. 116, lines 26-29).

J. The hearing on petitioner's petition to compromise said bankrupt's interest in said Dinkler note

was heard by Referee McGugin on April 15, 1965, and no creditor appeared to object to the same; thereupon the compromise and sale was confirmed (See Order Confirming Sale, dated May 3, 1965, R. 55, 56).

3. Facts relating to the disallowance of United Carpet's claim as a secured creditor (January 6, 1966-March 15, 1966).

A. On January 6, 1966, the Trustee served on United Carpet and filed below his objections to the allowance of United Carpet's claim, both as a secured and unsecured creditor, and gave as his reasons for objecting to said claim to secured status, "failure to properly identify security, if any, and evaluate the same. Failure to state information sufficient to identify secured status." (R. 74-75)

B. On or about January 10, 1966, United Carpet filed its first amended complaint for labor and materials, dated December 27, 1965, in said Kern County Superior Court action, again seeking to foreclose its mechanic's lien claim on the Bakersfield Inn property and also to seek an imposition of a constructive trust on the interest of the bankrupt, American National Insurance Company, and Greenfield State Bank, in the Dinkler note and the proceeds thereof (R. 57-73). Ronald O. Reichert, his wife, and the Trustee herein were named defendants in said first amended complaint. However, said complaint was not served upon the Trustee herein until on or about March 15, 1966.

C. The hearing on the Trustee's objections to United Carpet's creditor's claim was calendared for

February 3, 1966, and on said date no appearance was made by United Carpet. Because of the default, Referee Franson initially disallowed the claim both as a secured and unsecured claim, but subsequently allowed the same as an unsecured claim and disallowed the same as a secured claim (R. 74) on or about February 17, 1966.

D. On March 7, 1966, United Carpet filed its motion to set aside disallowance of its claim as a secured claim and noticed the motion for a hearing before Referee Franson on March 10, 1966 (R. 88).

E. On March 10, 1966, neither appellant nor its counsel appeared; however, the Referee was advised by telephone of the intention of United Carpet's counsel not to further press its motion to set aside the disallowance as a secured claim unless said counsel personally appeared to argue the same (R. 88, 132). Referee Franson, by order dated March 15, 1966, thereupon disallowed appellant's claim as a secured claim and reaffirmed his order allowing the same as an unsecured claim (R. 90-91).

F. The record is silent as to the exact substance of the telephone communications between counsel for both parties and the Referee prior to and on the March 10 hearing date. However, each counsel has made unsworn references to the same in various briefs and in argument to the District Court (R. 107, 117, 118, 132, 162), and the Referee made certain handwritten notes concerning such communications (R. 88).

The gist of the conversations to which there is no apparent dispute is as follows:

i. All calls were initiated by United Carpet's counsel.

ii. All calls related to the alleged secured status of United Carpet's creditor's claim.

iii. Both counsel argued with each other the merits of United Carpet's claim as a secured creditor (1) based on its mechanic's lien claim; and (2) based on a constructive trust or equitable lien related to the moneys received by the Trustee from the compromise and sale involving the Dinkler note.

iv. The agreed upon disallowance of United Carpet's claim as a secured creditor if its counsel failed to appear and argue his constructive trust or equitable lien theory, and the request of United Carpet's counsel to dismiss his motion to set aside disallowance of its claim as a secured creditor in the event of his failure to appear.

G. On or about March 15, 1966, the Trustee was served with a copy of United Carpet's first amended complaint and summons in said Kern County Superior Court action.

4. Facts relating to the voluntary disqualification of Referee Franson (April 15, 1966-June 21, 1966).

A. On April 15, 1966, the Trustee petitioned the bankruptcy court for an order staying the State Court action and proceedings against him, and for a restraining order (R. 93-98).

B. At the time of the making of the order to show cause and restraining order on April 15, 1966, as requested by the Trustee, Referee Franson apparently disqualified himself from further hearing of all matters between the parties hereto. The only evidence of such voluntary disqualification, however, is found in the order itself which noticed the hearing of the Trustee's petition to stay, before Judge Crocker, sitting in bankruptcy (R. 96-97), and Judge Crocker's handwritten note to United Carpet's counsel on said counsel's letter to Judge Crocker dated June 21, 1966 (R. 158), at which latter time United Carpet's counsel strenuously objected in writing to the disqualification of Referee Franson by himself (R. 155).

5. Facts occurring subsequent to the voluntary disqualification of Referee Franson (May 2, 1966-October 27, 1966).

A. On May 2, 1966, at the time of the hearing by Judge Crocker of the Trustee's petition to stay further proceedings in the State Court, United Carpet filed its petition for permission to sue the Trustee in such State Court (R. 102).

B. On May 2, 1966, oral argument on both the petitions of the Trustee and United Carpet were heard by the District Court below, sitting in bankruptcy (R. 173).

C. Briefs were thereafter submitted by both parties (Trustee's opening brief filed May 12, 1966, R. 103-111; United Carpet's reply brief filed June 10, 1966, R. 112-129; and Trustee's closing brief filed June 15, 1966, R. 148-153).

On June 14, 1966, United Carpet filed a motion to set aside the Referee's order of March 15, 1966 (R. 142-143), a petition requesting an extension of time for review of said order (R. 144-146), and concurrently therewith filed a petition for reclamation (R. 136-141). Although entitled "Second Motion to Set Aside . . ." this was in reality United Carpet's first such motion, as its earlier motion of March 7, 1966, was directed to an earlier order of the Referee dated February 17, 1966, which was reconfirmed by the March 15 order.

On June 21, 1966, counsel for United Carpet forwarded a letter to Judge Crocker, requesting further oral argument on the matter (R. 158). And the Court answered that letter by stating that it would hear any matters that counsel might wish to bring on for hearing, including further oral argument (R. 158).

D. On July 6, 1966, the Trustee filed his answer in opposition to each of the two new petitions and the motion filed by United Carpet on June 14, 1966 (R. 160-167).

E. On June 23, 1966, United Carpet dismissed its first amended complaint in said Kern County Superior Court, both as to the Trustee herein and as to Greenfield State Bank (R. 159).

F. Further, at the same time, United Carpet settled its claims in said Kern County Superior Court action against American National Insurance Company arising out of said Kern County Superior Court action, for some $16,000 (R. 207).

G. All of the then pending matters between the parties hereto, including hearings on United Carpet's (1) petition for extension of time for review; (2) second motion to set aside disallowance of claim as a secured claim; and (3) petition for reclamation, were argued orally and in detail on September 12, 1966, before the District Court below, sitting in bankruptcy (R. 168).

H. On October 11, 1966, the District Court below made its order denying (1) United Carpet's petition to sue Trustee in State Court; (2) second motion to set aside and for reconsideration; (3) petition for extension of time for review; and (4) petition for reclamation (R. 168-169).

I. On or about October 13, 1966, the Trustee submitted his proposed findings of fact and conclusions of law to the District Court (R. 173-176), and on October 18, 1966, United Carpet objected to the proposed findings and conclusions and requested special findings (R. 177-181).

J. The District Court entered its findings of fact and conclusions of law and amended judgment on October 27, 1966, notice of which was mailed to appellant on October 31, 1966 (R. 173-175; 182-185).

K. United Carpet filed its Notice of Appeal from said findings and conclusions and amended judgment on November 25, 1966 (R. 188-189).

L. The District Court's findings of facts and conclusions of law from which United Carpet appeals are set forth below in haec verba.

*Findings of Fact*

It Is True That:

1. On June 24, 1966, Respondent, Sahrad Kerkochian, Jr., dba United Carpet Shop, dismissed without prejudice its suit against Petitioner-Trustee in Kern County Superior Court Civil Suit No. 89999.

2. That Respondent-Petitioner, to-wit: Sahrad Kerkochian, Jr., dba United Carpet Shop, had his opportunity to have his day in Court on each and all the matters raised by each of the Petitions and Motions filed herein.

3. That the Referee rightly determined that Respondent Sahrad Kerkochian, Jr. dba United Carpet Shop's claim herein was unsecured.

4. That more than ten (10) days, to-wit: ninety (90) days elapsed between the making of the Referee's said Order of March 15, 1966 and the filing by Respondent of its Motion to Set Aside, to reconsider and extend time for review.

*Conclusions of Law*

From the foregoing facts, this Court concludes:

1. That the dismissal of Respondent's suit against the Petitioner-Trustee in the Kern County Superior Court civil matter number 89999, makes it unnecessary for this Court to rule on the Petitioner-Trustee's Motion for a permanent injunction and a stay of further proceedings therein.

2. That the Referee's Order of March 15, 1966, has finally and conclusively established the rights of

Respondent-Petitioner as an unsecured creditor only of the above-named bankrupt's estate.

3. That Respondent-Trustee herein, may not collaterally attack the Referee's decision of March 15, 1966 in the State Court.

4. That Respondent is now estopped to claim an equitable lien or constructive trust against the property of the above named bankrupt herein and his Petition for Reclamation should therefore be denied.

From the foregoing Findings of Fact and Conclusions of Law, the Court concludes that Respondent-Petitioner's Petition for extension of time for review, Second Motion to Set Aside disallowance of claim as secured claim and for reconsideration, Petition for Reclamation, and his Petition to sue Trustee in State Court, should all be denied and judgment entered accordingly.

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## SUMMARY OF ARGUMENT

Appellant indicates that he wants his "day in court." However, he has been granted numerous days in court, received the utmost of judicial consideration, and continues to belabor points that have been hashed and rehashed for a period now of approximately three years.

This appeal in reality poses three major issues for this Court to decide. Briefly they are as follows:

(1) Did the District Court, in considering all the evidence and facts presented by both parties, clearly err in its decision as disclosed by its findings of fact, conclusions of law, and judgment?

Appellant has not directly attacked the District Court's decision, and therefore the answer to such question must necessarily be in the negative. Nevertheless, appellant seeks to avoid the District Court's decision by attacking the Referee's order of March 15, which poses the second question.

(2) Does a Referee's voluntary disqualification of himself from hearing certain contested issues between parties void all his prior orders as between the same parties in the absence of any showing of affirmative error?

(3) The final question posed to the Court would appear to be whether or not a creditor denied a secured status can thereafter secure such status indirectly by a subsequent action based on theories that were or could have been advanced by him in the earlier proceeding wherein he sought to secure such secured status?

The second question above in turn poses two incidental issues, which are:

(a) Is a Referee in Bankruptcy subject to federal statutes which provide for the disqualification of judges and justices under certain circumstances; and

(b) If a Referee is disqualified from acting in any particular case, are his orders or judgments rendered prior to such disqualification void or voidable.

## ARGUMENT

### I

### THERE IS NO SUBSTANTIAL EVIDENCE OR THEORY ADVANCED BY APPELLANT WHICH WOULD JUSTIFY THIS COURT IN REACHING A CONCLUSION CONTRARY TO THAT OF THE DISTRICT COURT.

United Carpet's appeal is in reality an appeal from the Findings and Judgment of the District Court itself, sitting in bankruptcy, entered on October 27, 1966 (R. 173). Federal Rule 52(a) says in part that,

> "In all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . ."

The District Court, on May 2, 1966, and on September 12, 1966, examined all of the evidence, reviewed all of the briefs submitted by counsel for both parties, and heard extensive oral argument pertaining to all issues involved between the parties hereto, and after due consideration of the same made its own findings, conclusions and judgment. These findings and judgment decreed in part that the order of the Referee made on March 15, 1966, was properly determined (R. 174), and the District Court thereby adopted and affirmed said order of the Referee.

Further, Rule 52(a) also states that,

> ". . . Findings of Fact shall not be set aside unless clearly erroneous."

It has also been asserted on many occasions that the Court of Appeals is not at liberty to disturb the

findings of the District Court where there is no substantial evidence or theory which would justify the Court in reaching a conclusion contrary to that of the Judge or Referee.

> 3 Collier on Bankruptcy (14th Ed.) Sec. 25.30, p. 973.

However, since the appellant does not and cannot state to this Court that the findings of fact of the District Court are clearly erroneous, United Carpet necessarily seeks to go behind said findings and judgment and attack the Referee's Order of March 15th.

As was said in *Matter of Ernst* (C.C.A. 2d 1939), 107 F.2d 760, 761,

> "Concurrent findings of fact by the referee and the judge will ordinarily be accepted on appeal."

In the instant matter, the findings of the District Court were deduced from established facts and uncontradicted evidence, from which the District Court properly drew its own inferences and conclusions, which were in part the same as the Referee's in his order of March 15, 1966.

Thus appellant has had the benefit of a complete consideration and review of all the facts that were before the Referee and much more, including evidence and argument, by the District Court, and after such consideration the District Court made independent findings and conclusions which were in part the same as the Referee's. Therefore, without more, this appeal should be dismissed.

## II

### A REFEREE IN BANKRUPTCY IS NOT A JUDGE, BUT MERELY AN OFFICER OF THE COURT OF BANKRUPTCY, AND THEREFORE NOT SUBJECT TO STATUTES PROVIDING FOR THE DISQUALIFICATION OF DISTRICT JUDGES.

8A C.J.S. Bankruptcy, Sec. 268, p. 411 et seq.; *Fish v. East,* 114 F.2d 177, 200 (C.C.A. 10); *Ginger v. Cohn,* 255 F.2d 99, 100 (C.C.A. 6).

The Tenth Circuit Court stated in *Fish v. East,* supra, at page 200,

> "There appears to be no rules either of said district (district court) or in the rules of civil procedure, or in the general orders, relating to the removal or disqualification of referees. A party aggrieved by an order of the referee may file a petition for review."

Section 39(b) of the Bankruptcy Act sets forth three specific instances where the Referee should disqualify himself. However, even in those three instances it would appear that the act of disqualification is a matter for the Referee or Court's discretion. The reason given for Referee Franson's voluntary disqualification is not one of the three.

Thus, ignoring for the moment the independent decision of the District Court, which should be the real object of United Carpet's appeal, appellant's efforts to have the Referee's order of March 15th declared void solely by reason of the language of 28 U.S.C. 455, should fail, and the cases cited on page 18 of appellant's brief are therefore not in point.

In the instant matter, when it became apparent that the issues between the parties to this appeal were going to become a matter of contested adversary proceedings requiring discretionary rulings by the Referee, the Referee voluntarily disqualified himself because of his former representation as co-counsel for appellant in the 21(a) examination matter, which occurred approximately two years earlier. However, this in no way rendered his orders made prior to such voluntary disqualification void or even voidable.

Further, the Referee's order of March 15th was made with the knowledge, consent and approval of counsel for appellant. In fact, appellant's counsel admits that he advised the Court and adversary counsel on March 10th by telephone that if he did not appear to argue for a ruling that United Carpet was a secured creditor based upon the theory of a constructive trust or equitable lien, that the Court could disallow United Carpet's claim as a secured creditor (R. 118).

The Referee's order of February 17, 1966, finding that United Carpet was an unsecured creditor to the full extent of its claim, has never to this date been attacked by appellant and stands as a final order still uncontested by appellant. Counsel for appellant was at all times aware of the fact that Referee Franson had been his co-counsel in the initial 21(a) examination proceedings, and at no time did appellant ever object to any prior rulings by Referee Franson or attempt to disqualify him for any purpose.

In fact, the Trustee has never moved to disqualify Referee Franson for any reason in the within matter, and as late as June 22, 1966, United Carpet objected to the Referee's act of disqualification (R. 155).

The Referee's disqualification of himself occurred solely by reason of the inherent sense of fairness and impartiality of Referee Franson, which decision was made by the Referee at least a month or more subsequent to his order of March 15.

Therefore, the Trustee submits that ignoring the District Court's findings and judgment completely, nevertheless appellant's attack on the Referee's order of March 15th should fail.

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## III

**IN THE ABSENCE OF SPECIFIC CONSTITUTIONAL OR STATUTORY PROVISION FORBIDDING A DISQUALIFIED JUDGE FROM ACTING, A JUDGMENT RENDERED BY A DISQUALIFIED JUDGE IS VOIDABLE BUT NOT VOID.**

49 C.J.S. Sec. 17, p. 42;
30A Am. Jur. Sec. 216, p. 113.

Assuming for the moment that Referee Franson were disqualified to make his order of March 15, 1966, nevertheless unless the disqualification is a matter of statutory or legal prohibition, any orders made prior to such disqualification should only render the order voidable, not void.

In the instant case, appellant for the first time advanced his theory that the Referee's order of March 15th was invalid by reason of the act of disqualification by Referee Franson on October 18, 1966 (See Objections to Findings, R. 177-180). This argument first advanced on October 18, 1966, was some seven months subsequent to the order, and even now appellant has made no motion to void the order of March 15th.

In the interim period, however, appellant has had a review and hearing on the merits before the District Court, which resulted in the reaffirmance of the March 15th order and a denial of any other relief.

Worthy of comment also is the fact that the Referee's order of March 15, 1966, was little more than a ministerial act, for he had previously found that United Carpet was an unsecured creditor, which finding is not contested even at this time by the appellant, and the order of March 15 disallowing the claim of United Carpet as a secured creditor was made with the consent and even pursuant to the request of appellant's counsel.

Even in the situation where the judge is disqualified by law from presiding over a lawsuit, his orders of a ministerial nature not requiring any discretionary action are valid.

30A Am. Jur., Sec. 215, pp. 112, 113.

Thus again, the Referee's order of March 15th should not properly be subject to attack because of the perfunctory nature of such order in the instant case.

## IV

### APPELLANT FAILED TO SEEK REVIEW OF THE REFEREE'S ORDER OF MARCH 15 AS REQUIRED BY SECTION 39(c) OF THE BANKRUPTCY ACT.

As stated in 2 Collier on Bankruptcy, paragraph 39.16, page 477,

> "Subdivision c was added to Section 39 of the 1938 Act for the purpose of clearly outlining the procedure to be followed in obtaining a review of a Referee's order and in the interest of certainty and uniformity."

Section 39(c) expressly limits the time in which a petition for extension of time to file a petition for review and a petition for review can be made. The time limitation is ten days following the entry of the order or to such time to which the Referee extends the time, provided a request for extension is made within said ten-day period.

In the instant case, United Carpet's petitions for such were not filed until ninety days after the making and entry of the Referee's order. It was not then within the discretion of either the Referee or the District Court to grant such right of extension.

Further, the prevailing view seems to be that while a Referee may reconsider *allowed* claims at any time before the estate is closed, a creditor is not entitled to such reconsideration if his claim is disallowed in whole or in part. In such a case an aggrieved creditor must petition for review within the time as stipulated in Section 39(c) and according to the procedure outlined therein.

2 Collier, Par. 39.17, pp. 1481, 1482.

The District Court, although properly holding that appellant's motions to set aside, reconsider, and extend time for review, were untimely filed and therefore denied, nevertheless did give appellant a full-scale hearing and consideration of all issues involved in the March 15 order.

Appellant's petition for reclamation is in fact an attempt to collaterally circumvent the order of March 15th which disallowed him his requested secured creditor status.

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## V

**IT IS A WELL SETTLED PRINCIPLE THAT RES JUDICATA MAY BE PLEADED AS A BAR, NOT ONLY AS RESPECTS MATTERS ACTUALLY PRESENTED TO SUSTAIN OR DEFEAT THE RIGHT ASSERTED IN THE EARLIER PROCEEDINGS, BUT ALSO AS RESPECTS ANY OTHER AVAILABLE MATTER WHICH MIGHT HAVE BEEN PRESENTED TO THAT END.**

*Chicot County Drainage District v. Baxter State Bank,* 308 U. S. 371, 378.

The Supreme Court in the *Chicot County* case, supra, 308 U. S. 371, 378, stated:

> "The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain

> or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' "

In the most recent edition of Collier on Bankruptcy, it is stated:

> ". . . it is safe to deduce from the Act that it contemplates a choice to be made by a secured creditor between the following three possibilities: (1) to prove his claim as an unsecured claim and surrender his security; or (2) to prove his claim as a secured claim and give the bankrupt credit for the value of the security; or (3) not to prove at all and rely solely on the security."
>
> 3 Collier, 14th Ed., par. 57.07, n. 19, p. 158.

United Carpet, by the filing of its creditor's claim on February 19, 1965, chose to seek the status of both a secured and an unsecured creditor (R. 39). Therefore, United Carpet was required by Section 57(a) of the Bankruptcy Act to specifically identify and disclose in his proof of claim any security which he held.

The claim itself mentioned United Carpet's mechanic's lien claim, but at that time United Carpet was well aware of the abandonment by the Trustee of the real property in question as the result of the Referee's order of October 13, 1964 (R. 173).

Furthermore, at the time of the filing of its creditor's claim, United Carpet had been aware of the assignment of the Dinkler note to American National since the 21(a) examination in July of 1964.

Still further, United Carpet had set forth its claim to an equitable lien by way of a constructive trust on the moneys derived by the Trustee from the compromise and sale of the bankrupt's interest in the Dinkler note in its first amended complaint filed in the Kern County Superior Court action, which complaint was dated December 27, 1965 (R. 64-72).

Additionally, United Carpet's counsel discussed the equitable lien theory as a basis for United Carpet's secured creditor status prior to the making of the March 15th order (R. 118). And yet, not until June 14, 1966, some ninety days after the March 15th order, did United Carpet ever advance its claim to the equitable lien.

Thus, pursuant to the principles set forth in the *Chicot County* case by the Supreme Court, supra, 308 U.S. 371, and pursuant to the provisions of Section 57(a) of the Bankruptcy Act, the March 15th order is res judicata as to the issues formed in the petition for reclamation and should preclude and estop appellant from further hindering or delaying the closing of the bankrupt estate and distribution to the general creditors, of which appellant is one.

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## CONCLUSION

The appellee admires the tenacity of the appellant, but abhors the unconscionable delays occasioned by the same, which without merit have caused undue prejudice and extreme hardship to all other general creditors of the bankrupt.

Appellant has had the advantage of a full-scale hearing on the merits, liberal review and reconsideration of the Referee's orders, and should not now be permitted to seek the secured status denied him seventeen months ago.

The Trustee opines that the District Court's findings, conclusions, and judgment of October 27, 1966, should be affirmed by this Court and appellant's appeal dismissed.

Dated, Bakersfield, California,
August 14, 1967.

Respectfully submitted,
S. B. Gill,
*Attorney for Appellee.*

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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

S. B. Gill,
*Attorney.*